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# California Law Review

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## California Legislation of 1921 Providing for Declaratory Relief \*

THE term "declaratory judgment" is an unfamiliar name for a kind of judgment which is familiar to us all. It is used in England to describe the relief which is granted in cases where the court, instead of awarding damages, or the possession of property, or an injunction or mandatory decree, merely determines and declares the disputed rights of the parties to the action. Here in California we can recognize the declaratory judgment in our decrees quieting title and establishing the validity of bonds. The legislature of 1921 has adopted three acts which considerably extend the scope of the declaratory relief obtainable in our courts; and because these acts are based in part upon English practice and recent legislation in other states, it may be worth our while to consider their purpose and meaning.

It has been asserted that the common law and equity courts afforded no remedy whatever which was declaratory in character and acted only to prevent or redress a wrong which had been done or threatened by the defendant. It is unquestionably true that our early law, like all primitive law, addressed itself primarily to the task of keeping the peace; and yet it is interesting to note that even the common law provided writs for the determination of disputed rights, where there was no claim that a wrong had been done and where the judgment did not call for any execution. For instance, when adjoining landowners were in doubt as to the location of their boundary, they were allowed to sue out the writ *de perambulatione facienda*, under which the boundary was ascertained and fixed so as to bind the parties and their heirs.<sup>1</sup> And the Year-books show that where a freeman was claimed by another as his villein, he could

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\*Address delivered before the Bar Association of Los Angeles County, June 24, 1921. See Cal. Stats. 1921, ch. 136, 364, 463.

<sup>1</sup> Fitzherbert, New Natura Brevium, 133, Hale's notes, 310.

have his status established by the writ of *libertate probanda*.<sup>2</sup> But aside from these occasional instances of declaratory relief in the early law, and aside from the equitable jurisdiction to advise trustees and the somewhat similar jurisdiction in interpleader and quia timet cases, we may say that the machinery of the common law and equity courts was used to redress or prevent wrongs or compel the performance of obligations. But in the early nineteenth century, in accord with the reforming spirit of the time, a demand was made for an extension of declaratory remedies, to the end that parties who were desirous only of performing their obligations and of securing their rights might know by authoritative judgment of the courts, the extent of those obligations and rights. In response to this demand, and in view of the prevalence of declaratory actions under the Scotch and Continental law, Parliament included in the Chancery Procedure Act of 1852 a provision authorizing the granting of declarations of right.<sup>3</sup> This provision, however, was narrowly interpreted,<sup>4</sup> and ten years after the adoption of the Judicature Acts, in 1883, the Supreme Court adopted a rule which, with a supplementary rule of ten years later, is the basis of the English jurisdiction over declaratory relief. The rule of 1883 provides as follows:

"No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment is sought thereby, and the court may make binding declarations of right, whether any consequential relief is or could be claimed or not."<sup>5</sup>

The precise meaning of this rule is not even now settled by the English decisions. Indeed, it was not until 1915 that it was established that the courts had power under it to make a declaratory judgment not merely that the plaintiff had a certain right, but that he was not subject to an asserted duty or obligation.<sup>6</sup> However, the English reports do furnish a multitude of instances of judgments rendered under the authorization of these two rules. Many of them, especially those in the Chancery Division, settle disputed questions of property right in much the same way as do our own decrees of distribution or judgments quieting title. Others are rendered in

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<sup>2</sup> Statham's Abridgment (Klingensmith's translation) 849; Fitzherbert, *Natura Brevium*, 77, Hale's notes, 179, Glanville (Beames' translation) Book V, ch. 4.

<sup>3</sup> Stats. 15 and 16 Vict. ch. 80, 86, 87. See also Stats. 13 and 14 Vict. ch. 35.

<sup>4</sup> See *Cox v. Barker* (1876), L. R. 3 Ch. Div. 359.

<sup>5</sup> 7 Statutory Rules and Orders 51.

<sup>6</sup> *Guaranty Trust Co. v. Hannay & Co.* [1915] 2 K. B. 536.

situations where the American courts have not hitherto been in the habit of granting declaratory relief. Some of the most striking instances of declaratory relief are to be found in cases growing out of commercial controversies during the recent war. The value and effect of a declaratory judgment will be apparent from the statement of a case of this character which was decided by the Court of Appeal during the past year.

In this case it appeared that in 1914 a company engaged in mining in India had agreed to sell to a Belgian corporation engaged in foreign trade a large quantity of manganese ore, the deliveries to extend over a period of years. The war broke out, the Trading with the Enemy Act was passed and in 1915 was extended so as to prohibit all trading with persons doing business in territory occupied by the enemy. The mining company thereupon claimed that the Belgian company was doing business in Belgium, that the performance of the contract had become illegal and that all obligation thereunder had terminated. If this situation had arisen in the United States, the mining company would have had either to continue performance or run the risk of a judgment for damages; for the question whether business had been done in Belgium by the purchaser since the German occupation was one which was open to considerable doubt. However, the mining company applied for a declaratory judgment that the contract had terminated; the Belgian company counter-claimed for a declaration that the contract obligation was only suspended until a reasonable time after the end of the war; and the court, after a hearing, rendered a declaratory decree in favor of the plaintiff, releasing it, in effect, from further performance.<sup>7</sup>

Instances of this kind brought home to the American bar the desirability of extending the scope of the declaratory judgment, so that our men of business might have the opportunity of securing an authoritative declaration of disputed rights, even though there had been no invasion of the alleged right and no occasion therefore to invoke the punitive or preventive powers of the courts. Scholarly articles upon the subject were written by Professors Borchard of Yale University, Professor Sunderland of the University of Michigan and others.<sup>8</sup> The subject was discussed extensively in bar asso-

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<sup>7</sup> *Central India Mining Co. v. Societe Coloniale Anversoise* [1920] 1 K. B. 753.

<sup>8</sup> 28 *Yale Law Journal*, 1, 105; 16 *Michigan Law Review*, 69. See bibliography on the subject, 34 *Harvard Law Review*, 698.

ciations, and during the past two years declaratory judgment statutes, of varying comprehensiveness, have been adopted in several of the states. Some of these, such as the Michigan and Kansas statute, follow quite closely the language of the English rules; others, as in New York and California, are accommodated to the scheme of a local Code of Procedure. A bill providing for declaratory relief in the Federal courts has been pending in Congress. The Commissioners for Uniform State Laws are engaged in drafting a uniform act upon the subject.<sup>9</sup> And this year the State of California has extended the powers of the Superior Court to grant declaratory relief by the three statutes which are the subject of this discussion.

I had occasion to state recently a fact which must be apparent to all of us upon a moment's consideration—that the declaratory judgment is by no means a novelty in our California practice. Before England had adopted any of its modern legislation upon the subject, our Practice Act of 1850 had been enacted with the provision now appearing in our Code of Civil Procedure, to the effect that an action might be brought "by one person against another for the purpose of determining all adverse claims which the latter makes against the former for money or property upon an alleged obligation;" and in the fifth volume of our reports you will find an instance where an action was maintained under this provision to have it determined that the plaintiff was not indebted to the defendant upon a promissory note.<sup>10</sup> But our declaratory judgments have not been confined to actions brought under this statute; for suits to determine adverse claims to real property,<sup>11</sup> suits to establish the validity or invalidity of a marriage under the provisions of the Civil Code,<sup>12</sup> and suits to establish the validity of bonds of reclamation districts under the Political Code,<sup>13</sup> are all brought for declaratory relief pure and simple. Declaratory judgments are thoroughly consistent with the spirit of the California codes and the remedies which they afford. Proceedings under the McEnerney Act, and under the Torrens Act, and under the statute for quieting title against unknown claimants after twenty's years' possession, are of the same general character, and like the reclamation bond proceed-

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<sup>9</sup> See Borchard "The Uniform Act on Declaratory Judgments," 34 Harvard Law Review, 697.

<sup>10</sup> *King v. Hall* (1855) 5 Cal. 83; California Law Review, 133.

<sup>11</sup> Cal. Code Civ. Proc. § 738.

<sup>12</sup> Cal. Civ. Code, §§ 78, 80.

<sup>13</sup> Cal. Pol. Code, § 3480.

ings, they may bind not only the parties named, but also claimants whose identity is unknown to the plaintiff. The judgment in all of these various proceedings is a final determination of the rights of the parties and they are forever bound by its terms; but beyond this determination the judgment does not go; and neither the sheriff nor the losing party is required to act in order to carry the judgment into effect. This is the essence of the declaratory judgment.

Nevertheless, it was considered that the scope of the declaratory judgment in this state might well be widened, so that the courts might have power to grant this relief whenever it might seem desirable, and for this purpose the Civil Procedure section of the California Bar Association prepared, and there were presented to and passed by the Legislature, which adjourned a few weeks ago, three statutes upon this subject. The first of these amends our code provision with reference to the quieting of title, so that a decree may be obtained quieting title to personal property and determining adverse claims thereto, with the same facility with which we have obtained in the past decrees quieting title to realty.<sup>14</sup> The value of this amendment is apparent from a recent decision of a District Court of Appeal, whereby it was held that since there had been no conversion or wrongful detention by the defendant, the court was without power to pass upon the adverse claim of the defendant to the personal property involved in the suit.<sup>15</sup> There is no sound reason for this distinction between different forms of property and it is now happily abolished.

The second statute provides that any person may bring an action to have determined between him and the person sued the existence or non-existence of the relation of parent and child, by birth or adoption.<sup>16</sup> This is in line with the provisions already existing with respect to the declaration of the validity or invalidity of a marriage, which were availed of in the Sharon litigation.<sup>17</sup> It will probably not be often used; but when the occasion arises, it may be found to be extremely helpful.

And finally, and most important of all, a general statute was passed dealing with declaratory relief, which was in the main based upon the English law. The old provision with respect to the determination of claims upon an alleged obligation was not disturbed;

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<sup>14</sup> Cal. Stats. 1921, ch. 364.

<sup>15</sup> *Lamus v. Engwicht* (1919) 39 Cal. App. 523, 179 Pac. 435.

<sup>16</sup> Cal. Stats. 1921, ch. 136.

<sup>17</sup> *Sharon v. Sharon* (1885) 67 Cal. 185, 7 Pac. 456.

and the remedies afforded by the new statute are declared to be cumulative. The first section reads as follows:

"Any person interested under a deed, will or other written instrument, or under a contract, or who desires a declaration of his rights or duties with respect to another, or in respect to, in, over or upon property, or with respect to the location of the natural channel of a water course, may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an action in the superior court for a declaration of his rights and duties in the premises, including a determination of any question of construction or validity arising under such instrument or contract. He may ask for a declaration of his rights or duties, either alone or with other relief; and the court may make a binding declaration of such rights or duties, whether or not further relief is or could be claimed at the time. The declaration may be either affirmative or negative in form and effect, and such declaration shall have the force of a final judgment. Such declaration may be had before there has been any breach of the obligation in respect to which said declaration is sought."

There are several provisions of this statute which perhaps deserve comment in the light of the experience of the English courts.

1. In the first place, it is provided that the new remedy can be invoked only "in cases of actual controversy relating to the legal rights and duties of the respective parties." This clause was introduced by amendment in the legislature; and it may have been intended to safeguard the constitutionality of the act or to preclude the consideration of moot cases. For either purpose the clause was perhaps unnecessary; because the courts will not entertain moot cases whether declaratory relief is sought or not; and the decisions indicate that the courts can be given the power to define the rights of parties, even in the absence of an actual controversy.<sup>18</sup> But the limitation has been imposed; and it accords with the requirement which the English courts enforce with considerable strictness. Under their decisions the mere existence of doubt as to the rights of the parties, a mere possibility of a dispute, does not suffice; there must be an actual controversy. In a recent case,<sup>19</sup> the plaintiff sought a declaration that the defendant had no claim against him under a bond, but it appeared that defendant had never asserted any such claim except by reserving, in connection with the execution of

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<sup>18</sup> *Robinson v. Kerrigan* (1907) 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep. 90.

<sup>19</sup> *In re Clay* [1919] 1 Ch. 66.

another paper, whatever rights he might have under the bond. The court refused to grant any declaratory relief.

2. In the second place, an action may be brought to determine either the existence of a right in favor of the plaintiff or the non-existence of a right in favor of the defendant. "The declaration may be either affirmative or negative in form and effect." In England there seems to have been considerable doubt as to the power of the courts to grant a so-called "negative" declaration; that is, one which negated the existence of a right in the defendant. It was finally established, however, in 1915, by the leading case of *Guaranty Co. v. Hannay*,<sup>20</sup> that there was jurisdiction to grant such relief, although it was intimated that the courts would be very sparing in exercising the jurisdiction. Although the English cases show an indisposition to grant a negative decree, our statute makes no distinction between the two forms of relief, and the negative decree, far from being a novelty with us, is the form of relief provided for by our old section 1050 of the Code of Civil Procedure.

3. Moreover, a declaration may be made, although there is no claim that either party has been guilty of any wrong. The contract may be construed, its legality may be determined, the extent of duties imposed by statute may be defined, although no cause of action for other relief has as yet matured. This phase of the declaratory judgment constitutes one of its most useful features.

4. Again, it is expressly provided that an application for declaratory relief does not deprive the parties of any remedy which they would otherwise have. The right to replevy or attach should not be lost because the prospective defendant has brought proceedings for a declaration. In this regard the statute codifies the rule of decision under section 1050 of the Code of Civil Procedure.<sup>21</sup>

5. The applicant may ask for a declaration, either alone or with other relief. This provision follows the English practice. Sometimes a plaintiff will seek an injunction and a declaration, and the court will refuse the injunction but grant the declaration. Or, again, the plaintiff may obtain both damages and a declaration, as where the court made a declaration that a charter party remained in force and awarded the plaintiff damages for past breaches.<sup>22</sup> And so in an action against a trade union, the judgment declared that a

<sup>20</sup> *Supra*, n. 6.

<sup>21</sup> *King v. Hall*, *supra*, n. 10.

<sup>22</sup> *Elliott Steam Tug Co. Ltd. v. John Payne & Co.* (1920) 25 Com. Cas.



resolution purporting to expel the plaintiff was void, enjoined any action upon the resolution and awarded damages for interference with the right of membership.<sup>23</sup> If the procedure is to achieve its greatest usefulness, it must be made flexible. But although other relief may be demanded, the statute provides that the failure to ask for it in the declaratory action will not bar the plaintiff from obtaining it by a separate suit.

6. Finally, no provision has been made for relief against the state. The suggestion has been made that the citizen should be allowed to sue the state or its officials to determine the scope of the duties imposed by such statutes as the Sherman anti-trust law, or to determine the constitutionality of legislation generally. The English courts, except in very rare cases, have refused to entertain such actions, both on the ground of precedent and policy;<sup>24</sup> and for the present, at least, there seems to be good reason for observing the same attitude, despite the occasional advantages of such a remedy.

So much for the conditions under which jurisdiction may be exercised. But even though there be jurisdiction, the court will not be bound to make a declaration of rights whenever a request for one is made; for the statute provides that

"The court may refuse to exercise the power granted by this chapter in any case where its declaration or determination is not necessary or proper at the time under all the circumstances."

This provision is in line with the policy of allowing the courts greater control over the details of procedure and it will enable them to prevent the abuse of the declaratory action. The English courts, with their extensive powers over procedural matters, have not hesitated to withhold declaratory relief whenever they have felt satisfied that no useful end would be served thereby. While they have not professed to be governed by definite and well-settled rules in the exercise of this discretion, it may be helpful to state some of the instances in which they have decided that declaratory relief is or is not proper.

1. At the outset it may be fairly said that where rights of property are involved, the English courts almost uniformly have granted declaratory relief in case of dispute. The attitude of the English courts is sound; for in spite of the old limitations on the bill in equity to remove a cloud on title, we know that in modern life

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<sup>23</sup> *Rex v. Cheshire County Court Judge* [1921] 1 K. B. 301.

<sup>24</sup> *Smeeton v. Attorney General* [1920] 1 Ch. 85 and cases cited.

almost any uncertainty as to the rights of ownership may "obstruct the alienation" of the property and create a practical, if not a technical, cloud upon the title. The same liberality in granting declaratory relief with respect to property rights will doubtless obtain under our new legislation. The suit to determine adverse claims may be brought even though only personal property is involved; the comprehensive language of the general statute has removed, we hope, all doubt about the right of an equitable claimant to establish his right against the legal owner; and the legislature has gone so far as to introduce, out of abundant caution and at the possible expense of artistic expression, a reference to a particular class of property rights—those relating to waters in streams—recalling the use of a declaratory decree by our Supreme Court in an important case upon percolating waters where injunctive relief was deemed inappropriate.<sup>25</sup> We may fairly consider therefore that the situation with regard to the declaration of property rights has been adequately covered; and that the comprehensiveness of the remedy in California accords with the result of English experience.

2. When should the court grant a declaration of rights under a contract or alleged contract? It would seem that two situations, at least, may fairly call for the use of this remedy: first, where the contract affects the use of property or where its probable transfer as property may be affected by doubts as to its validity or meaning, and secondly, where the parties to the agreement are in doubt as to their future conduct because of the disputed right. An instance of the first class appears in a case decided last year by the English courts. A lease of a theater contained a covenant that the lessee would during the term "maintain the prices of admission as now charged" and would not "reduce the same without the consent of the lessor." The question arose between the parties whether the lessee might raise, instead of reducing, the admission charges without being guilty of a breach of his covenant to "maintain" them. The court granted him a declaration that he could.<sup>26</sup> Another case has been reported within the past few months where the contract affected property rights. In this case a husband and wife had made a separation agreement, which the husband contended was void as against public policy; and the court granted a declaration that the agreement was valid and binding.<sup>27</sup> Many instances can be found

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<sup>25</sup> *Burr v. Maclay Co.* (1908) 154 Cal. 428, 98 Pac. 260.

<sup>26</sup> *In re Dott's Lease* [1920] 1 Ch. 281.

<sup>27</sup> *In re Meyrick's Settlement* [1921] 1 Ch. 311.

where the courts have granted declarations so that the parties might know whether they were bound by a particular agreement and if so, to what extent. The commercial disputes relating to the effect of the war upon existing contracts have already been referred to. Did the war terminate, or suspend, or have no legal effect whatever upon the obligation of a particular contract? These questions the English courts have been ready and willing to answer by declaratory decree.

3. If a dispute arises as to whether a statute creates rights in favor of one person against another, and if so, to what extent, this dispute may furnish the basis of a declaratory decree. The English courts, in deciding whether or not to grant relief under these circumstances, have been governed by practically the same considerations as in the case of contract disputes. For instance, an Act of Parliament was passed imposing on mine owners the duty of paying their employees weekly, and also of delivering to each employee a statement containing detailed particulars showing how the amount of the payment was computed. A suit was filed by an employee, alleging that the defendant company was his employer and under a statutory duty to deliver the statement. The defendant contended that it did not come within the terms of the statute, but the court granted the declaration desired by the plaintiff, and the parties were thus assured of the extent of their future rights and obligations.<sup>28</sup>

In connection with rights arising from contracts and statutes, it is interesting to notice that the declaratory judgment has been used to determine the rights of stockholders and others interested in corporate property. Suppose that a controversy should arise as to the respective rights to future dividends between the preferred and common stockholders. Must the time of the declaration of the dividend be awaited in order that these rights may be settled? Probably so, in the former condition of the law; but if the English decisions are followed, a declaratory decree may be entered which will definitely determine the rights of the parties for their future guidance.<sup>29</sup>

4. The rights of personality, including the rights to bodily security and reputation, will probably not call for declaration or definition in many cases; although here also circumstances may

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<sup>28</sup> *Simmonds v. Newport Co.* [1921] 1 K. B. 616.

<sup>29</sup> *Anglo-French Music Co. v. Nicoll* [1921] 1 Ch. 386

arise where a judicial definition may become advisable.<sup>80</sup> And so a mere declaration that a tort had been committed would ordinarily be refused as the English courts exercise their discretion. An instance of this attitude appears in the recent English reports. Plaintiffs complained of a conspiracy of defendants to slander them; under the English law, the conspiracy was not actionable in the absence of proof of damages, and no damages were proved. Nevertheless the trial judge granted a declaration that the defendants had conspired. This declaration was stricken out on appeal, one judge saying that the granting of the declaration "involved a misconception of the circumstances under which declaratory decrees have been made." Another judge summarized the practice as follows: "It may be convenient to have a claim for a declaration as to the rights of the parties in respect to contracts extending over a long space of time, and not to wait until there is a breach to have the rights determined. But I have never heard of a declaration that a defendant is doing wrong, unless perhaps it is followed by a statement that damage has accrued or is likely to accrue, and that the defendant threatens to continue his wrongful act against the plaintiff."<sup>81</sup>

5. There is one rule which the English courts have observed in deciding whether or not declaratory relief should be awarded, and that is that if the subject-matter is one which is confided to a particular tribunal to be dealt with in a particular way, the High Court of Justice will refrain from making a declaration binding on the special tribunal. A declaration of the invalidity of a patent was refused, where the plaintiff might have applied to the patent

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<sup>80</sup> In this connection it may be noted that injunctions against threatened defamation have been generally refused on the ground that the constitutional right to freedom of speech and of the press stands in the way. It is conceivable that a declaratory judgment, which would not offend the constitutional guaranty, might under some circumstances serve a useful purpose in this and similar situations.

It would seem that the term "rights" occurring in the statute should be construed liberally and not so as to exclude, for instance, the "permissive right" of Professor Terry, which is covered by the "privilege" of Professor Hohfeld, nor the "facultative right" defined by the former, which comes within the scope of the "power" of the latter. See comment of Professor Borchard, 34 *Harvard Law Review* 704, 707. The language of the New York Practice Act and the draft of the Uniform Act have instead the phrase "rights and other legal relations." New York Practice Act, § 473. It perhaps does not conduce to precision of expression to describe a "right" even inferentially, as a "relation"; but the intent to confer a comprehensive jurisdiction is apparent.

<sup>81</sup> *Thomas v. Moore* [1918] 1 K. B. 555.

office for a revocation;<sup>32</sup> and so the court refused to decide, by way of declaration, the question whether a water company might erect an engine-house without the consent of the municipal authorities, because this controversy might be more conveniently settled in a summary proceeding provided by statute.<sup>33</sup> The propriety of these decisions is apparent, as a matter of the exercise of discretion, entirely apart from the question of jurisdiction; and we may easily draw the analogies in our own practice and assume that the Superior Court would not, if it could, make a declaration with respect to rights which would ordinarily be determined by local authorities or by such special tribunals as the Industrial Accident Commission or the Railroad Commission.

I have thus stated some of the instances in which the British courts have granted or refused this species of relief, not because their decisions are of controlling effect, but because they serve to show how under one system of procedure the declaratory judgment has been administered, and because some of these decisions may have persuasive effect when our courts come to exercise the discretion confided in them by the new legislation. Even in England the proper scope of the declaratory judgment is by no means settled; within the past year one judge of the Court of Appeal has complained of "too great a tendency . . . to ask for declarations on every possible point",<sup>34</sup> while another judge, expressing the contrary view, has remarked: "I should be very sorry to see cut down a jurisdiction which was a most valuable addition to the existing powers of the court."<sup>35</sup> But whatever differences of opinion there may be about the scope of this remedy, there is none about its value in many situations; and we may confidently expect that our courts will develop this remedy to meet the needs of American conditions and realize its value without permitting its abuse.

About eight months ago, those of us who were interested in the extension of declaratory relief were surprised to read that a statute drawn in almost the precise language of the English rules of court upon the subject had been declared unconstitutional by the Supreme Court of Michigan, on the ground that it attempted to vest in a

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<sup>32</sup> *Northeastern Co. v. Leeds Forge Co.* [1906] 1 Ch. 324. In this connection it is interesting to note the declaratory relief provided by U. S. Rev. Stats. § 4918.

<sup>33</sup> *Grand Junction Waterworks v. Hampton Urban Council* [1898] 2 Ch. 331.

<sup>34</sup> *Markwalk v. Attorney General* [1920] 1 Ch. 348.

<sup>35</sup> *Simmonds v. Newport Co.*, *supra*, n. 27.

judicial officer powers which were not judicial in their nature.<sup>36</sup> The provisions of the Michigan constitution with regard to the separation of powers are duplicated in our California constitution<sup>37</sup> and it therefore becomes important to determine whether or not this decision will be followed in this state.

In the first place, this decision was rendered by a divided court, and the question of constitutionality was raised by the court itself without any objection on this ground from either party. Moreover, the case was one where a declaratory judgment should have been refused and which was calculated to mislead the court as to the nature of the remedy. The plaintiff, a car-conductor, sued his employer, a street railway company, for a declaration that they might enter into a contract requiring the employee to work more than six days out of seven, notwithstanding the terms of a certain statute. No contract had in fact been made between the parties for any such terms of employment; there was no dispute between the parties whatever; and the plaintiff and defendant were not, therefore, asking for a definition of any legal relation between them, but were placing before the court for its consideration a purely supposititious problem. It goes without saying that the relief should have been denied; and upon this the court agreed; but the majority preferred to rest the decision on the ground that in rendering a declaratory decree, the court would not be exercising judicial powers.

Without discussing the opinion at length, it may be said that it is based primarily on two analogies which seem to be unsound—the analogy of moot cases which courts refuse to consider and the analogy of the advisory opinions which are provided for in some of the states but which are not allowed in states where the powers of government are strictly divided. But the action for declaratory relief is not a moot case, because there is a real issue between the parties which is settled by the judgment. And for the same reason the rendition of an advisory opinion, which is not a judicial function, which decides no concrete controversy and which does not therefore even come within the rule of *stare decisis*, is an act of an entirely different character from the making of a declaratory judgment, which conclusively determines the rights of litigants after a hearing.

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<sup>36</sup> *Anway v. Grand Rapids R. Co.* (1920) 179 N. W. 350 (Mich.).

<sup>37</sup> Cal. Const., Art. III, sec. 1.

We may question the Michigan decision with all the more confidence because the same objection has been made to the constitutionality of three California statutes, and each time it has been definitely overruled. The statute permitting the confirmation of the organization of irrigation districts, the Torrens Act and the McEnerney Act were all attacked on the ground that they attempted to clothe the courts with non-judicial powers, and all of these acts were sustained. In the case involving the Torrens Act, the language of Mr. Justice Shaw is particularly appropriate. He said:

"The refinements of civilized life, and the necessity for the orderly regulation, determination and protection of human affairs and rights of property, have long required the extension of the judicial power beyond the settlement of controversies which have actually arisen, so as to include the function of providing security against disputes and claims which may arise. Hence, in modern times the power of the courts may be, and often is, exerted to protect property and rights from possible, though at the time unknown, hostile claims and pretensions, or to merely declare a status, or right, and thereby to forestall and prevent controversies which, but for the judicial declaration, might arise in the course of future transactions or proceedings."

Referring to the McEnerney Act and the Torrens Act, the court says:

"In each case a status, or right, was to be established, declared, and made conclusive, as the foundation for subsequent proceedings and transactions. . . . Whether or not this is strictly an exercise of judicial power, as originally instituted, it cannot be denied that it is a power of the class which, from time immemorial, has been committed to and exercised by the courts. At the time the constitution was adopted this class of powers had long been usually exercised by the courts alone. It must be presumed that in providing therein for the division of governmental power into three departments, legislative, executive, and judicial, and declaring that no person charged with the exercise of the powers belonging to one of them should exercise functions appertaining to either of the others, this usual power of the courts was in mind, and that it was intended that the courts should continue to exercise these quasi-judicial powers, as they had previously been accustomed to do. A law which merely creates a new occasion and provides a new procedure for the exercise of this power cannot be said to transgress this clause of the constitution."<sup>38</sup>

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<sup>38</sup> Robinson v. Kerrigan, *supra*, n. 18; see also Hoffman v. Superior Court (1907) 151 Cal. 386, 90 Pac. 939; Title Restoration Co. v. Kerrigan (1906) 150 Cal. 289, 88 Pac. 356; People v. Linda Vista Irrigation District (1900) 128 Cal. 477, 61 Pac. 86.

Until we can be convinced that there is a constitutional distinction between the quieting of title to real and personal property, between the determination of contract rights and property rights, we must, it seems to me, agree with the minority opinion in the Michigan case.

Of course it would be a great mistake to assume that the declaratory judgment will be a panacea for all of the inadequacies of our judicial system. Some of the panegyrics of the new legislation have been, perhaps, over fulsome. It will probably not live up to all of the expectations of its advocates, any more than did the Statute *consimili casu*. But we may well be satisfied if it does, like that statute, afford to some suitors who have hitherto been without remedy, the service which the judiciary of a civilized country owes to its people.

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